United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2072

To be argued by
MARJORIE M. SMITH

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

FRANCIS BLOETH, :

Plaintiff-Appellant, :

-against- :

R.J. HENDERSON, Superintendent of Auburn Correctional Facility, et al., : No. 75-2072

Defendants-Appellees. :

- -x

BRIEF FOR PLAINTIFF-APPELLANT

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QUESTIONS PRESENTED

1. Whether the District Court erred in dismissing, sua sponte, this prisoner's civil rights complaint for failing to state grounds for relief when appellant alleged (a) that he was confined to segregation for seven days without a hearing and that at the hearing he eventually received he was not afforded a written statement of either the evidence relied upon or of the reasons for the 30 day segregation sentence imposed upon him; (b) that he was deprived of the opportunity while in segregation to attend any religious services; and (c) that he was punished for assisting other inmates in securing access to the courts.

2. Whether the District Court erred in dismissing appellant's supplemental complaint for failure to exhaust administrative remedies as to his claim of confinement in segregation beyond the 30 day sentence meted out, when no adequate or effective administrative remedy was available.

STATEMENT OF THE CASE

In a Memorandum-Decision and Order dated November 8, 1974, Judge Port of the United States District Court for the Northern District of New York dismissed sua sponte appellant's pro se civil rights complaint and supplemental complaint (A. 12).* The verified complaint alleged that appellant had been unjustifiably confined in segregation for "unauthorized use of institutional stationery" when the writing of letters such as the one in question was part of appellant's job as a prison law clerk. Appellant claimed that the punishment was imposed upon him without affording him the requisite due process of law, and that it deprived him of access of religious services, exercise, and various rehabilitative programs in which he had been participating. The complaint, submitted on October 3, 1974, ten days after appellant's confinement in segregation began, prayed for a declaration that defendants' actions were unconstitutional, an injunction against their recurrence and other and further relief deemed appropriate by the Court. The supplemental complaint, submitted on October 29th, alleged that plaintiff was being unlawfully held in segregation beyond the 30 day

*Numbers in parentheses preceded by "A" refer to pages of the appendix.

sentence he had been given and repeated the original prayer for injunctive relief. In addition, appellant sought $25.00 and $1.15 lost wages per day of confinement in compensatory damages and $10.00 per day of confinement in punitive damages (A. 1-12).

In his Memorandum-Decision, Judge Port held that appellant's complaint failed "to disclose any denial of plaintiff's procedural due process rights and, in addition, fails to establish any federal or constitutional violation." The Court further held as to appellant's supplemental complaint, "plaintiff has administrative remedies that he can and must pursue" (A. 13). Accordingly, on November 8, 1974, appellant's complaint was filed and judgment was entered dismissing it for the reasons stated in Judge Port's opinion (A. 13). On May 2, 1975 this Court granted appellant's motion for leave to appeal in forma pauperis and for the assignment of counsel. On August 14, 1975, William E. Hellerstein, The Legal Aid Society was appointed as counsel.

STATEMENT OF FACTS

The complaint alleges that on September 23, 1974 appellant Bloeth was first "keeplocked" in his cell and then transferred to the punitive segregation housing unit at Auburn Prison without explanation (A. 1). Two days later, appellant was brought before the institutional Adjustment Committee and informed that he was

guilty of unauthorized use of prison stationery, and had thereby attempted to defraud a United States Court Judge (A. 2). Appellant acknowledged typing the letter in question as part of his job, officially assigned to him by the institution, of assisting other inmates with their legal problems. He denied any attempt to defraud or imply that he was an attorney, noting that all his outgoing mail contained his name, prison and criminal identification file number in two separate places, as well as an explanation by the Superintendent that appellant was a prison inmate (A. 2).*

Following the Adjustment Committee meeting, appellant remained in segregation. From September 23rd until September 29th appellant was confined to his cell twenty-four hours per day (A. 4). He was denied all opportunity for exercise, was not permitted to attend any religious services and was denied the opportunity to continue attending the college educational classes in which he had been enrolled (A. 3-4).** In addition, appellant was deprived of the opportunity to work and earn $1.15 a day for commissary purchases (A. 3-4).

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*The letter typed by appellant is not in the record.

**On September 25th, appellant wrote to the Superintendent seeking permission to participate in religious services and educational programs; his request was denied (A. 3, 6, 7).

On October 1st, appellant appeared at a Superintendent's Proceeding after having been formally charged with unauthorized use of institutional stationary. Appellant restated that he had no motive or interest to defraud anyone and had only intended to assist another inmate concerning a legal issue. Appellant was told he had embarassed the Superintendent (A. 2). He was thereupon sentenced to 30 days in segregation.

From October 1st, until at least October 29th,* appellant continued to be deprived of the opportunity to attend religious services, to work in the law library assisting inmates and earning wages, to attend college classes, and to socialize with inmates in the general population (A. 10). Between September 29th and October 3rd, appellant was permitted to exercise in an enclosed area in front of his cell but was not afforded any outdoor recreation. (A. 4).**

On October 29th, after appellant had been held in segregation for 36 days, he mailed the Court a supplemental complaint. In this supplement, appellant alleged that when he asked Lieutenant Norris at an

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*The record before the District Court does not indicate the date when appellant was released from segregation.

**Appellant's supplemental complaint makes no specific reference to the deprivation or provision of exercise after October 3rd.

Adjustment Committee meeting on October 24th why he was being detained in segregation more than 30 days, Lt. Norris stated that appellant "should never be returned to the general population and would remain in administrative segregation indefinitely" (A. 9). Lt. Norris further informed appellant that "no reason was necessary for placement in segregation," appellant "was in prison long enough to know that such proceedings did not necessitate due process," and appellant should "write a writ if he didn't like it" (A. 9-10).

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN DISMISSING APPELLANT'S COMPLAINT WHICH STATED CLAIMS FOR RELIEF FOR VIOLATIONS OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW, FREEDOM OF RELIGION, AND ACCESS TO THE COURTS.

A. Appellant's Allegation That He Was Confined to Segregation for Seven Days Without a Hearing, and That at the Hearing He Eventually Received He Was Not Afforded a Written Statement of Either the Evidence Relied Upon or of the Reasons for the 30 Day Segregation Sentence Imposed Upon Him, States a Claim for Relief.

In Wolff v. McDonnell, 418 U.S. 539 (June 26, 1974), the Supreme Court set forth the minimum procedural safeguards which must be afforded inmates at prison disciplinary hearings. The Court held that any inmate who may be subjected to the loss of good time or a major

change in the conditions of his confinement,* 418 U.S. at 571 (fn. 19), must be afforded the following rights: (1) advance written notice of the charges at least twenty-four hours before the hearing; (2) a written statement by the factfinders of the evidence relied on and the reasons for the disciplinary action; (3) the right to call witnesses and present documentary evidence when doing so does not jeopardize institutional safety or correctional goals; and (4) the right to be assisted by counsel substitute where the inmate is illiterate or where the issues are unusually complex. 418 U.S. at 563-67, 569-70.

Yet despite the fact that appellant's alleged offense took place almost three months after the Supreme Court's decision in Wolff, it is apparent from appellant's complaint** that he was not afforded at any time a written state-

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*There is no doubt that inmates punished by placement in segregation are entitled to the Wolff safeguards. Crooks v. Warne, 516 F.2d 837 (2nd Cir. 1975); Larkins v. Oswald, 510 F.2d 583, 586 (2nd Cir. 1975); Powell v. Ward, 392 F. Supp. 628, 630 (S.D.N.Y. 1974).

**Since the District Court dismissed the pro se complaint without receiving any responsive papers or evidence, it was bound to construe the complaint as true for purposes of its decision, as this Court must for purposes of reviewing that decision. Cruz v. Beto, 405 U.S. 319 (1972); Haines v. Kerner, 404 U.S. 519 (1972); Conley v. Gibson, 355 U.S. 41 (1957).

ment of the evidence relied on and the reasons for the disciplinary action taken against him.* As the Supreme Court pointed out in imposing the written records requirement

> Written records of proceedings will...protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceedings. Further, as to the disciplinary action itself, the provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly. Without written records, the inmate will be at a severe disadvantage in propounding his own cause to or defending himself from others. 418 U.S. at 565.

Records of the type mandated by the Supreme Court, if available, would have clarified whether appellant was impermissibly punished for simply "embarassing" the Superintendent or whether there was real substance to the charge of unauthorized use of institutional stationery. See Procunier v. Martinez, 416 U.S. 396 (1974); Wilwording v. Swenson, 502 F.2d 844 (8th Cir. 1974). In short, as this Court noted in reviewing another instance of prisoner

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*It is noteworthy that New York State correctional officials did not require that inmates be provided with a written statement of the evidence relied upon until almost a year after the Wolff decision. Even now, the New York disciplinary regulations are not in full conformity with Wolff in that they fail to afford the inmate a written statement of the reasons for the disciplinary action, 7 N.Y.C.R.R. §253.4(i).

discipline, "[T]his case is a nice example of the wisdom of Wolff v. McDonnell..." Larkins v. Oswald, 510 F.2d 583, 584 (1975).*

B. Appellant's Allegation That He Was Deprived of the Opportunity While in Segregation to Attend Any Religious Services States a Claim for Relief.

There is no doubt that freedom of religion occupies a preferred status among the panoply of rights retained despite imprisonment. Cruz v. Beto, 405 U.S. 319 (1972); Cooper v. Pate, 378 U.S. 546 (1964); Pierce v. LaVallee, 293 F.2d 233 (2d Cir. 1961). Strict scrutiny is applied to any state claim that restraints on the practice of religion in prison are necessary; limitations can only be imposed "if the state regulation has an important objective and the restraint on religious liberty is reasonably adapted to achieving that objective". LaReau v. MacDougall, 473 F.2d 974, 979 (2d Cir. 1972), cert. denied, 414 U.S. 878 (1973).

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*Not only were appellant's constitutional rights violated at the Superintendent's Proceeding, but he was deprived of any due process for the first week of his confinement in segregation. For two days, appellant was given no notice whatsoever of the basis for his confinement. [Crooks v. Warne, 516 F.2d 837 (2d Cir. 1975); Powell v. Ward, 392 F.2d 628 (S.D.N.Y. 1975) (ordinarily inmates should not be segregated for more than 24 hours before receiving written notice of charges)]. He was then brought before the institutional Adjustment Committee at which time he was simply orally notified of the charges against him. [Crooks v. Warne, supra (approving District Court decision requiring state prison officials to afford inmates Wolff procedural safeguards whenever inmate charged with specific acts)].

In Wright v. McMann, 387 F.2d 519 (2d Cir. 1967), this Court held that allegations by a prisoner of the denial of an opportunity to attend religious services because of punitive confinement could, under certain circumstances, state a claim for relief. In LaReau v. MacDougall, supra, the Court permitted the exclusion of a prisoner from religious services only after a showing that he would use the opportunity to provoke a major prison rebellion. The Court cautioned

> This is not to say that every prisoner in segregation lawfully can be prevented from attending church services in the chapel. Not all segregated prisoners are potential troublemakers; so some discrimination must be made by prison authorities among the inmates in the segregation unit. Id. at 979-80, n. 9.

Two days after appellant's confinement in segregation, he wrote to Superintendent Henderson requesting permission to participate in the religious services he had previously been attending.* The next day, the Superintendent rejected appellant's request, stating "I am sure you realize that the incurring of disciplinary sanctions may affect your program status" (A. 7).

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*Appellant's letter to the Superintendent, like his complaint, mentioned that he had been attending Christian Science and Quaker Services, both of which he was "deeply interested in." (A. 6).

Applying the appropriate standard that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief", Conley v. Gibson, supra, 355 U.S. at 45-6, the District Court should not have dismissed this claim since there was no evidence that permitting appellant to participate in religious services while in segregation would have been disruptive.*

C. Appellant's Allegation That He Was Punished for Assisting Other Inmates in Securing Access to the Courts States a Claim for Relief.

It is now established beyond cavil that the access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed. Johnson v. Avery, 393 U.S. 483 (1969); Procunier v. Martinez, 416 U.S. 396, 419-22 (1974). As this Circuit has observed, "the Constitution protects with special solicitude a prisoner's access to the courts" Sostre v. McGinnis, 442 F.2d 178, 189 (2d Cir. 1971); see also Corby v. Conboy, 457 F.2d 251, 253 (2d Cir. 1972). Such access must be permitted to allow inmates to challenge

*Admittedly appellant's request to participate in two forms of religious worship is somewhat unusual. However given that appellant had been regularly attending both of the requested services prior to his confinement in segregation, any question whether appellant's interest in both types of religious services falls within the protective ambit of the First Amendment cannot be peremptorily decided against appellant on the basis of his pro se pleading. See Eisen v. Eastman, 421 F.2d 560, 562; (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970); Cruz v. Beto, 405 U.S. 319 (1972).

the conditions of their confinement as well as their criminal convictions. Wolff v. McDonnell, 418 U.S. 539, 580 (1974).

In order to effectuate this right of access to the courts, the state must either provide some means of adequate legal assistance or permit inmates to obtain legal assistance from other inmates. In Johnson v. Avery, the Supreme Court reversed the Sixth Circuit's determination that petitioner Johnson could, consistently with the Constitution, be punished for offering legal assistance to other prisoners. See also Beard v. Alabama Board of Corrections, 413 F.2d 455 (5th Cir. 1969); Wainwright v. Coonts, 409 F.2d 1337 (5th Cir. 1969). While access to inmate legal assistance is subject to reasonable rules and regulations relating to legitimate institutional interests, Johnson, supra, it clearly cannot be denied as a matter of discipline. Johnson v. Anderson, 370 F. Supp. 1373, 1385 (D. Del. 1974).

Appellant's complaint, construed with the requisite liberality, states a claim under Johnson v. Avery. The letter which appellant wrote, and for which he was punished, was written in his capacity as a law clerk assigned to furnish legal assistance to other inmates. Assuming the truth of appellant's claim that there was no basis for the prison officials' conclusion that he had attempted to

defraud a judge, appellant was impermissibly punished merely for assisting others in legal matters.

POINT II

THE DISTRICT COURT ERRED IN DISMISSING APPELLANT'S SUPPLEMENTAL COMPLAINT FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES AS TO HIS CLAIM OF CONFINEMENT IN SEGREGATION BEYOND THE 30 DAY SENTENCE METED OUT WHEN NO ADEQUATE OR EFFECTIVE ADMINISTRATIVE REMEDY WAS AVAILABLE.

This Court has ruled that exhaustion of administrative remedies is not a prerequisite to commencement of a civil rights action under 42 U.S.C. §1983 alleging deprivation of constitutional rights under color of state law, if resort to administrative processes would be futile or if no administrative procedure offers the claimant an adequate opportunity to adjudicate his claims and obtain the requested relief. Eisen v. Eastman, supra; Sostre v. McGinnis, 442 F.2d 178, 182 (2d Cir. 1971) (en banc), cert. denied sub. nom. Sostre v. Oswald, 404 U.S. 1049 (1972); Ray v. Fritz, 468 F.2d 586 (2d Cir. 1972); Blanton v. State University of New York, 489 F.2d 377 (2d Cir. 1973); Plano v. Baker, 504 F.2d 595 (2d Cir. 1974).

In this case, the District Court should not have dismissed appellant's supplemental complaint alleging continued confinement in segregation after the expiration

of his 30 day sentence* for failure to exhaust administrative remedies since the only prescribed administrative review procedure available to him, a letter to either the Superintendent or the Commissioner of Correctional Services, 7 N.Y.C.R.R. §301.9, would clearly have been both futile and inadequate to remedy the alleged constitutional deprivations. Such a letter would have been futile since both the Superintendent and Commissioner must have known of appellant's confinement in segregation beyond his 30 day sentence: the Correction Law itself mandates that the Superintendent make "a full report" to the Commissioner "at least once a week" of the condition of every inmate in a special housing unit. §137(6)(d). To require appellant to address a written communication directly to these two officials who were already aware of his situation but had failed to take any corrective action would be to compel the performance of a "meaningless and plainly futile gesture." Sostre, supra, 442 F.2d at 182. See also Houghton v. Schafer, 392 U.S. 639, 640 (1968); Robbins v. Kleindienst, 383 F. Supp. 239 (D.D.C. 1974).

*The District Court questioned whether appellant had in fact been confined more than 30 days as of October 29, 1974, the date of the supplemental complaint. It appears that appellant's supplemental complaint was based upon his belief, which is certainly not unreasonable on its face, that his 30 day sentence was to run from September 23rd, the date he was initially transferred to segregation. In any case, this claim should not have been dismissed without giving appellant an opportunity to provide facts in support of it.

More significantly the prescribed letter is a wholly inadequate administrative remedy because no official in the Department of Correctional Services could provide appellant with the relief which he requested for the deprivations he had allegedly suffered. No one, including the Commissioner, can issue the equivalent of a direct, binding and enforceable court injunction against continued or repeated improprieties of subordinate officials. At best, the Commissioner might have assured appellant that in the future he would take steps to have the regulations obeyed. Similarly, as this Court noted in Ray, the prison administration cannot award prisoners monetary damages for constitutional deprivations. Since "the administrator is not empowered to grant" the only relief which appellant could still request, there was no adequate administrative remedy. Plano v. Baker, supra, 504 F.2d at 598.

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE JUDGMENT OF DISMISSAL SHOULD BE REVERSED.

Respectfully submitted,

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Dated: New York, New York
September 26, 1975.

CERTIFICATE OF SERVICE

This is to certify that I have this 29th day of September 1975 served a copy of the within Brief and Appendix on defendants-appellees by mailing via United States mail, postage prepaid, a copy of same to the attorney for defendants-appellees, Louis J. Lefkowitz, Attorney General, Two World Trade Center, New York, New York.

Marjorie Smith

MARJORIE M. SMITH